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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

NO. 752

EDWARD J. GILL, FRANK C. MENKING, JAMES A. HILL, WILLIAM BRITTON, DONALD M. WILSON, GEORGE F. ELY, ALBERT A. PETRICHEK, JOSEPH C. HORNFECK, JOHN J. SCHUBERT, WILBERT J. MAYER, HERMAN C. CARLSON, CLINTON O'SHELL, SR., WALTER T. WEIR, JOHN P. DAUGHERTY,
Petitioners,

v.

MESTA MACHINE COMPANY, a Corporation,
Respondent.

BRIEF OF MESTA MACHINE COMPANY, OPPOSING THE PETITION FOR CERTIORARI.

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OPINIONS OF THE COURT BELOW.

The Opinion of the United States Circuit Court of Appeals for the Third Circuit, filed January 21, 1948 (R. 424), is reported as *Gill, et al. v. Mesta Machine Company,* 165 Fed. (2d) 785.

This decision of the Circuit Court of Appeals affirmed the Findings of Fact, Conclusions of Law and judgment comprising the decision of the case by the United States District Court for the Western District of Pennsylvania, handed down February 20, 1947 (R. 9b-23b), and reported as *Gill, et al. v. Mesta Machine Company,* 69 Fed. Supp. 904.

JURISDICTION OF THIS COURT.

This Court has jurisdiction to grant or deny the writ of certiorari under Section 240 of the Judicial Code, as amended (28 U.S.C. 347).

COUNTER-STATEMENT OF THE CASE.

This is an action at law brought in the United States District Court for the Western District of Pennsylvania by a group of fourteen individual employees to recover overtime compensation and liquidated damages alleged to be recoverable from the defendant by virtue of the provisions of Section 16 of the Fair Labor Standards Act of 1938.[1] To the Complaint (R. 1b-3b), the defendant-employer filed an Answer which claimed the benefit of the six-year Pennsylvania Statute of Limitations (a partial defense thereafter conceded by the plaintiffs) and which raised also, as an affirmative defense to the whole of the claim, the contention that the plaintiffs had, at all material times, been employed as foremen and at work of such an executive and administrative character as had exempted their employment from the scope and effect of the Fair Labor Standards Act, under Section 13 (a) thereof and the applicable Regulations of the Wage and Hour Administrator (R. 3b-4b).[2]

This latter averment of the Answer raised the single issue which was tried and determined by the District Court. In all the proceedings in that Court, the issue was treated by the Court as an issue of fact. This view had the approval of all parties: the plaintiffs, as a group, and the defendant concurred in representations to the Trial Judge that the tests of exempt "executive" or "administrative" status under Section 13 of the Act were

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[1] Act of June 25, 1938, c. 676; 52 Stat. 1060; 29 U.S.C. 216, etc.).

[2] "Regulation 541.1": 29 Code of Federal Regulations, Section 541.1; 29 App. U.S.C. 541.1; 5 Fed. Reg. 4077.

those prescribed by the Administrator's Regulation 541.1.

Under that Regulation, an employee is an "executive," and his employment is not subject to the Wage and Hour provisions of the Act, if he is an employee

> "(A) whose primary duty consists of the management of the establishment in which he is employed or of a customarily recognized department or subdivision thereof, and
>
> "(B) who customarily and regularly directs the work of other employees therein, and
>
> "(C) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight, and
>
> "(D) who customarily and regularly exercises discretionary powers, and
>
> "(E) who is compensated for his services on a salary basis at not less than $30 per week (exclusive of board, lodging, or other facilities), and
>
> "(F) whose hours of work of the same nature as that performed by nonexempt employees do not exceed 20 percent of the number of hours worked in the workweek by the nonexempt employees under his direction; provided that this subsection (F) shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment."

As an examination of the record will show, the defendant assumed the burden of showing that the plaintiffs were exempt "executives" under the definition so

provided by Regulation 541.1. The Court ultimately determined, from a consideration of all of the evidence—including in particular certain testimony of the plaintiffs themselves which is printed in the transcript filed here—that each of the plaintiffs had, at all material times, held employment which had the six controlling characteristics prescribed by the Regulation.

Thus, the Trial Judge found, as matters of fact, that each of the plaintiffs had, at all material times, been employed as the foreman of some customarily recognized department of the defendant's machine shop, and had been, as such, charged with the primary duty of managing that department (R. 10b-14b); that, as a foreman, each of the plaintiffs had customarily and regularly directed the work of other employees in his department (R. 11b); that each of the plaintiffs had been responsible, as a foreman, to make recommendations concerning the promotions, discharges and other changes of status of his subordinates, which recommendations were given particular weight by his superiors in the defendant's management (R. 11b); that each of the plaintiffs had, in the management of his department, been required to exercise discretionary powers—to decide from hour to hour and from day to day what his subordinates should do, and how they should do it (R. 11b); that each of the plaintiffs had been compensated for his services on a salary basis of more than $30.00 per week (R. 12b-14b); and, finally, that, during his material periods of service as such a foreman, none of the plaintiffs had performed work of the same nature as that performed by non-exempt employees in the shop, for hours exceeding twenty per cent. of the number of hours worked in the same work-week by his own non-exempt subordinates (R. 14b).

Concerning the background of facts of the case, and concerning several of the six points of exempt status so found by the Trial Judge, there was no dispute. And in the area where disputes existed, the evidence was more than amply sufficient to support and warrant the Trial Judge's findings.

As to the background, it was shown without dispute that the defendant-employer, the Mesta Machine Company, had been engaged for more than forty years in the business of manufacturing heavy machinery, of the types used by steel companies and other metal manufacturing establishments for rolling and working steel and other metals, at a plant in West Homestead, a suburb of the City of Pittsburgh, Pennsylvania (R. 42b). It was shown that the productive facilities of the West Homestead plant consisted principally of a foundry, a machine shop and an erection department, adapted to the manufacture, machining and assembly of the huge castings and the other parts, some of them extremely large and heavy, which are used in such rolling mills, shears and other complicated machines, as the Company makes for its customers (R. 27b, 34b-36b; Ex. A, R. 425b; Ex. Z, R. 467b; etc.).

During the recent war, and the period of defense preparation which immediately preceded it, the Company's manufacturing facilities had been used largely for war purposes, not only to continue the manufacture of the Company's normal products, but also to produce military and naval guns, and other munitions and war materials (R. 40b-41b; 44b-45b). To meet the additional and sometimes excessive demands imposed upon it by this development of its business, the defendant had added new and additional buildings and departments to

its machine shop, and had greatly enlarged the force of individuals employed there. To provide management for the new departments and enlarged operations, it had promoted to positions as department foremen numerous machinists of long experience, amongst them thirteen of the fourteen plaintiffs. Herman G. Carlson, the fourteenth and remaining plaintiff, had been promoted to his position as a foreman many years before.

During a relatively brief period after his advancement, the appointment of each machinist so promoted to be a foreman was a provisional or probationary one. During his service as a probationary foreman, each appointee was paid at an hourly wage rate, and was allowed the overtime compensation prescribed by the Fair Labor Standards Act. From and after the end of his probationary period, and his permanent appointment as a foreman, each appointee was paid a monthly salary, which yielded substantially greater compensation than that previously paid him, but which included no specific allowance for overtime hours. Plaintiffs' claims for additional compensation related wholly to those periods of time during which they had, respectively, served as permanently appointed, salaried foremen. The histories of the probationary and permanent appointments of the fourteen plaintiffs, as they are shown by the evidence,[3] may be tabulated as follows:

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[3]Probably as a result of inadvertence, the transcript of the record served on this respondent includes only Volume 1 of the two-volume printed appendix which was filed with the Circuit Court of Appeals. Volume 2 of the appendix contains copies of all of the material exhibits, including those which summarize the employment histories of the fourteen petitioners. If Volume 2 has not been filed with this Court, the record here is incomplete.

Exhibit App.		Name	Wage Rate as Machinist	Promoted to Probationary Foreman: Date	Promoted to Probationary Foreman: Wage Rate	Promoted to Salaried Foreman: Date	Promoted to Salaried Foreman: Monthly Salary
H	439b	Herman G. Carlson	$0.85			9- 1-34	$225-$525
J	443b	John J. Schubert	1.04	7- 1-40	$1.25	10- 1-40	300- 425
F	435b	William Britton	1.20	4- 1-41	1.41	7- 1-41	363- 525
K	445b	Edward J. Gill	1.20	4- 1-41	1.41	7- 1-41	363- 525
N	451b	Thomas P. Daugherty	1.19	5-16-41	1.41	10- 1-41	363- 425
O	453b	James A. Hill	1.14	5-16-41	1.41	10- 1-41	363- 425
I	441b	Albert A. Petrichek	1.14	7- 1-41	1.41	10- 1-41	363- 525
G	437b	Joseph C. Hornfeck	1.19	8-16-41	1.41	1- 1-42	425
M	449b	Walter T. Weir	1.08	9-16-41	1.41	1- 1-42	425
P	455b	Frank C. Menking	1.14	10-16-41	1.41	1- 1-42	425
D	431b	George Ely	1.25	9-16-42	1.47	1- 1-43	425
C	429b	Clinton O'Shell	1.36	9-16-43	1.47	1- 1-44	425- 525
E	433b	Wilbert J. Mayer	1.25	10- 1-43	1.47	1- 1-44	425
L	447b	Donald M. Wilson	1.20	10-16-43	1.47	1- 1-44	425

According to the testimony of the plaintiffs themselves, each of them, from the moment he became a foreman, was put in charge of a department or division of the defendant's machine shop, consisting of a particular group of machines, permanently located in a particular building or buildings.

Defendant's management organization chart appears in the Record as Exhibit Z (R. 467 b). The machine shop organization appears on the left half of this chart. As the chart shows, the entire shop was directed by P. Grant, the Superintendent, assisted by two General Foremen of the entire operation: E. Yoezle and H. Machesky. Under these men, the shop was subdivided into a number of departments. Amongst them, and shown on the chart, are six departments which figure in this case. Three of these six, the "Small Aisle", the "Upper End" and the "Lower End" have been in existence for twenty-five years or more (R. 35 b; 37 b-39 b). Two others, the "900-foot Extension" and the "280-foot Extension" were built and established between 1940 and 1942 (R. 28 b), and are sometimes referred to collectively as the "New Shop" (see R. 165b; 206b; 288 b). The remaining general division is called "Ordnance" throughout the testimony. It was built early in the recent war, in 1941 and 1942 (R. 40 b), and is divided into two parts or physical subdivisions: the Lower End, equipped with forty-two planers, presses and similar machines, and the Upper End, equipped with thirty-two gun lathes and ten other machines (R. 40 b-41 b).

The testimony of John A. Berg, defendant's General Superintendent, described these subdivisions of the machine shop. Each of the plaintiffs, in his testimony, either declared or admitted that during all material

periods of his service as a foreman, he had been the "boss" of one of the subdivisions so described by Mr. Berg, and had been responsible to direct and supervise the work of the journeymen machinists employed therein. The testimony on these points, so given by Mr. Berg and by the plaintiffs, is summarized in tabular form on page 10, *infra*.

As foreman or "boss" of his department, each of the plaintiffs was resposible to higher management for the execution, during each day, of the manufacturing operations which has been assigned to that department. He was required to maintain the flow of work and materials to each machine (R. 73b-74b; 387b; 36b, etc.); to see that each machine was always adequately manned; and, largely by answering questions and solving problems which proved too difficult for his subordinate journeymen—and nearly always by the exercise of discretionary powers and authority, to prevent interruptions and to maintain the satisfactory production of acceptable work (R. 352b; 366b-367b; 390b, 398b, 400b, etc.).[4]

It was not disputed that the monthly salaries paid to the plaintiffs were computed at rates far greater than the minimum of $30.00 per week required by the Regulation. As is shown in the tabulation printed on page 7 above, they ranged from $225 to $525.

Finally, as was shown by their own testimony, none of the plaintiffs ever operated a machine himself, or did directly productive work of any kind himself, except for

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[4] See also R. 97b-104b; 343b; 127b; 201b; 217b; 229b-230b; 257b-259b; 294b-297b; 340b; 343b; 354b; 365b-357b; 375b; 381b; 389b; 394b; 406b; 418b-419b; 420b, etc.

Berg's Testimony App.	Name of Department	Number of Machine Tools	Value of Machine Tools	No. of Employees J—"Journeyman" H—"Helper"	Plaintiffs in Charge	Plaintiff's Testimony App.
37 b-38 b; 44 b	Small Aisle (40 yrs. old)	41	$ 320,000	41 J 20 H	Carlson Petrichek Schubert	144 b-145 b 237 b-238 b 94 b
35 b-36 b	Upper End (25 yrs. old)	33	800,000	33 J 36 H	Britton Hornfeck	222 b-223 b 272 b
39 b	Lower End (25 yrs. old)	38	700,000	38 J 26 H	Wilson	129 b
26 b; 29 b-30 b; 33 b-35 b	280-foot Extension (New Shop-1940)	16	450,000	16 J 17 H	O'Shell Ely Mayer	288 b; 290 b 157 b 201 b-208 b
38 b	900-foot Extension (New Shop-1941-42)	21	900,000	21 J 19 H	Gill	64 b; 59 b; 71 b; (cf. 165 b)
41 b	Ordnance (1941-42)					
	Upper End	32	1,200,000	42 J 23 H	Daugherty Hill	177 b 306 b-308 b
	Lower End	42	530,000	42 J 22 H	Weir Menking	257 b 229 b

one of two purposes: either to demonstrate to a subordinate how the subordinate should do his work, or else—and more rarely—to extricate the work in progress upon a machine from some critical situation, in an emergency, with which the journeyman machine operator was unable to cope (R. 240b; 77b-79b; 128b; 107b-108b, etc.).[5]

In short, the evidence in the case, beyond any question, supported and justified the findings of the Trial Judge that the employment of each of the fourteen plaintiffs, at all material times, had met each of the six tests of exempt executive status laid down by Regulation 541.1. The District Court refused to consider any test of executive status other than those prescribed by the Regulation. In keeping with this view of the law and with the Trial Judge's findings of fact, it held that the plaintiffs had been exempt "executives," and that they were, therefore, entitled to no overtime compensation under the Act. It therefore entered a decree dismissing the Complaint (R. 23b).

On their appeal to the Circuit Court of Appeals, the plaintiffs conceded that the Administrator's Regulation, so relied upon by the District Court, had afforded the proper test of their executive status, alleged by the defendant. This view of the law, again concurred in by the defendant, was accepted by the Circuit Court; and, after a consideration of the record as a whole, that Court concluded that the evidence was amply sufficient to sustain the findings of the District Court. Accordingly, the judgment of the District Court was affirmed (R. 424-425).

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[5]See also R. 128b; 135b; 240b; 259b; 338b; 340b-341b; 349b; 351b 352b-354b; 357b-358b; 366b-367b; 375b-376b; 383b-384b; 387b; 390b-391b; 394b-395b; 397b-398b; 400b; 403b; 410b; 415b-416b; 421b-422b, etc.

ARGUMENT.

I. The Case Involves No Question of Federal Law Which Has Not Been Settled by This Court.

As will have been observed, in both the District Court and the Circuit Court of Appeals, the parties deliberately presented this case as one which must turn upon the decision of a question or questions of fact, and which involved the decision of no important question of law. Both sides agreed, that is, that if the employment of the plaintiffs had possessed the characteristics described in the six paragraphs of Regulation 541.1, then the plaintiffs had been, as the defendant contended, exempt executives, and could recover nothing in such a suit. This approach was manifestly correct.

If it was true, as both parties evidently believed at every earlier stage of the case, that the Regulation provided the only applicable definition of the phrase "executive capacity," as it is used in Section 13 of the Act, it must follow that the only question validly presented in the District Court was that of determining whether or not the employment of each of the plaintiffs had possessed the characteristics described in the Regulation. And that question was, of course, a question of fact.

In the Statement of the Case contained in their petition for certiorari (pp. 3-5), the plaintiffs have made twenty-three separate assertions of fact concerning the nature of their employment. A few of these simply contradict the evidence and the findings of fact made by The Trial Judge. The others can have no meaning unless they be intended to provide tests of exempt "executive" status entirely different from those laid down by Reg-

ulation 541.1. Thus, the petition asserts, for example, that, as foremen, the plaintiffs had "nothing to do with placing of machines in the shop"; and that "the scheduling of production is done by the superintendent and not by the plaintiffs"; and that a general foreman of the entire machine shop had authority superior in some respects to their own; and that "labor relations bargaining through union representatives was carried on" by Mr. Berg, as the general manager or superintendent of the whole plant, and not by the plaintiffs. Many of the twenty-three assertions are either not true or not wholly true, but it makes no difference here whether they are true or not; for they are almost wholly irrelevant. Regulation 541.1 does not require, for example, that every exempt executive shall determine what machines shall be installed in his employer's establishment, or that he shall be in charge of the scheduling of production, or that he shall be the supreme authority in the establishment, or that he shall be empowered to make the employer's bargain with subordinate employees. Instead, the Regulation makes the six tests described above the sole tests of exempt executive status, and so makes immaterial all such collateral circumstances as those asserted here by the plaintiffs.

The correctness of the view of the Regulation taken by the District Court is not open to dispute. In *Walling v. General Industries Company,* 330 U.S. 545, 550 (1947) —a case overlooked and not mentioned in the petition for certiorari here—this Court considered and approved Regulation 541.1; recognized that the determination of the exempt and non-exempt status of any particular individual under that Regulation is wholly a determination of fact; and applied the rule that the findings of a Trial

Judge concerning any such matter of fact, if they are based upon adequate evidence, must be sustained and affirmed by the appellate Courts:

> "The District Court, having made findings substantially as stated above, proceeded to make additional findings of the existence of each of the facts on which an executive status, as defined by the Regulations, is made to depend.
>
> "We believe that the evidentiary facts afford an adequate basis for the inferences drawn by the Court in making such additional findings. At the least, we think that in drawing such inferences the Court was not clearly wrong, and conclude that the findings should therefore have been left undisturbed. The Circuit Court of Appeals' rejection of those findings cannot rest on the conflicting testimony of petitioner's witneses. The District Court heard the witnesses, and was the proper judge of their credibility."

II. Under Established Principles, This Court Will Not Review the Decision of the Issues of Fact Presented by This Case.

By the petition for certiorari presented here, the plaintiffs in effect pray that this Court shall review the evidence as a whole; that, having reviewed this evidence, it shall hold that the decision of the issue or issues of fact, reached by the District Court and affirmed by the Circuit Court of Appeals, was wrong; and that it shall, on that ground, reverse that decision. Such a prayer is directly contrary to the established policy of this Court. It is not the duty of this Court to re-examine decisions of issues of fact reached by subordinate federal Courts.

It is particularly improper to seek such a review here, where—as is true in this case—a Circuit Court of Appeals has approved findings of fact made by a District Court.

In *Allen v. Trust Company of Georgia,* 326 U.S. 630, 636 (1946), the Court stated the established rule as follows:

> "* * * Here two courts have resolved that question of fact in favor of respondents. * * * Those findings, being concurrent findings of the two lower courts, will be accepted here without reexamination of the evidence."

See also

U. S. v. O'Donnell, 303 U. S. 501 (1938).

III. The District Court Committed No Error in Rejecting Plaintiffs' Offers of Expert Testimony as to the Meaning of "Executive Capacity."

In their petition for certiorari (pp. 26-27), the plaintiffs complain because the Trial Judge rejected their offers of the oral testimony of certain labor union representatives, who proposed to express their opinions, as experts having no personal knowledge of the facts of the case, that the plaintiffs had not been exployed as "executives."

These rulings upon evidence were correct, and can afford no occasion for a review of the case here. Under Section 13 of the Act (29 U.S.C. 213), and under the law expressed and implied in *Walling v. General Industries Company, supra,* the only legally applicable test of exempt "executive" status is that afforded by the Adminis-

trator's Regulation. If, in their opinions upon the plaintiffs' hypothetical questions, the plaintiffs' experts proposed to accept the tests laid down by the Regulation then (as is stated in the Opinion of the Circuit Court of Appeals, R. 425) the exclusion of their testimony did the plaintiffs no harm, for the facts of the plaintiffs' employment and status were fully developed in the record. If, on the other hand, the plaintiffs' experts proposed to apply some standard or some definition of "executive" status other than that prescribed by the Regulation, then their opinions were incompetent and irrelevant, because the Act, by giving the Administrator the power to define and delimit exempt executive status, necessarily deprives any other authority, however expert he may be, of any legal power or right to interpret the Act in this particular.

Plaintiffs' position on this point of the case is not helped by their reference to the pamphlet "Executive, Administrative, Professional * * * Redefined," issued by the Administrator on October 24, 1940. In that pamphlet, an official publication, the Administrator stated, *inter alia,* his reasons for adopting the six tests of exempt executive status, laid down by Regulation 541.1. In the course of this explanation he declared that he had considered the practice of labor unions, and the testimony of labor union officials, in his establishment of the line between exempt executive and non-exempt subordinate employees. But the pamphlet made no suggestion that any District Court should ever be called upon to reexamine the questions which the Administrator had decided prior to the issuance of the Regulation, least of all that it should be the obligation of any District Court to reconsider the expert testimony of any labor union

official or any other person concerning the characteristics of executive status in industry.

In short, although the expert testimony now under consideration would probably have been relevant to the Administrator's investigation, which led to the formulation of his six conjunctive tests of executive status, such testimony cannot be used now to modify his Regulation, or in any way to impair its effect in such a case as this. For this purpose, the Administrator's Regulations have the same effect as though they had been written into the Statute (see *Sun Publishing Co. v. Walling,* 140 Fed. (2d) 445, 449 (6 C.C.A., 1944); *Stanger v. Vocafilm Co.,* 151 Fed. (2d) 894; 162 A.L.R. 216 (2 C.C.A., 1945); and *Walling v. General Industries Company, supra*), and are as little open to interpretation or modification by expert witnesses.

Conclusion.

The petition for certiorari states no reason which could justify a review by this Court of the decision concurred in by the two Courts below. The petition should, therefore, be dismissed.

Respectfully submitted,

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